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Illinois Commerce Commission On Its Own Motion	)	Docket No. 00-0586
Adoption of 83 ILL. Adm. Code 550, "Non-Discrimination in Affiliate Transactions for Gas Utilities"	)	

REPLY COMMENTS

ON BEHALF OF

THE CITIZENS UTILITY BOARD

AND

THE COOK COUNTY STATE'S ATTORNEY'S OFFICE

MARCH 9, 2001

INTRODUCTION

The Citizens Utility Board ("CUB") and the Cook County State's Attorney's Office ("Cook County") submit the following reply comments in response to Initial Comments submitted by the parties in this rulemaking.

I. THE COMMISSION MUST FIND THAT IT HAS AUTHORITY TO SET AFFILIATE RULES

No one would dispute that the Commission can only set rules consistent with its authority under the Public Utilities Act, and Nicor argues that the Commission does not have authority to set gas affiliate rules. "The General Assembly's failure to delegate the same rulemaking authority regarding gas utilities as it did regarding electric utilities means that the General Assembly did not intend for the Commission to exercise rulemaking authority with respect to gas utilities as electric utilities." Nicor Comments at 5.

While Nicor is correct that the legislature did not give the Commission the directive to set affiliate rules for gas companies, this omission must to be considered in context. The legislature passed restructuring legislation for the electric industry, while it did not consider legislation for the gas industry. Hence, the omission would have different meaning if the legislature had conspicuously left such language out of gas restructuring legislation.

The more important question is whether the Commission has authority to set gas affiliate rules under its broad authority to supervise utilities. Section 1-102 states:

> The Commission, or any commissioner or hearing examiner designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish.

220 ILCS 5/1-102. *See also*, 220 ILCS 5/4-101 (Supervision of public utilities). In Abbot Laboratories v.Illinois Commerce Commission, a case where customers questioned the ICC's authority to establish a non-cost based penalty for unauthorized use of gas, the court ruled that the Commission did not need express authority to establish the penalty. The court stated that while there is no express authorization in the Act, "it is a well established rule that the express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective." Abbot Laboratories v.Illinois Commerce Commission, 289 Ill. App. 3d 705, 712, 682 N.E. 2d 340 (Ill. App. Ct. 1997). In this case, the setting of the affiliate rules is within the Commission's broad authority to ensure that the transition to competition in the commercial and residential gas market does not allow utilities to cross-subsidize affiliates in a discriminatory manner. Section 1-102 states "That the goals and objectives of such regulation shall be to ensure ...(d) Equity: the fair treatment of consumers and investors in order that... (v) regulation allows for orderly transition periods to accommodate changes in the public utility service markets;" 220 ILCS 5/10-101. The gas affiliate rules are necessary for an orderly transition to competition.

In addition to arguing that the Commission does not have authority to set affiliate rules, Nicor takes the alternative position that it can live with the rules if the Commission inserts "in competition with ARGS" at the end of Section 550.30(a). Nicor Comments at 7. Nicor's Comments constitute a thinly veiled threat that Nicor will challenge the legality of the rules if the rules do not satisfy Nicor.

Given Nicor's position, the first thing the Commission must do is make a clear finding regarding its authority to set rules. Either the Commission has authority to set gas affiliate rules, or it does not. If the Commission lacks authority to implement whatever rules it believes to be in

the best interest of Illinois ratepayers, then CUB and Cook County submit that the Commission should suspend Nicor's pilot expansion until such time as the Commission does have authority to set rules. CUB also notes that during the course of the hearing on Nicor's customer select pilot, Nicor objected to cross-examination on the name and logo issue because the issue was part of the gas affiliate rulemaking – where Nicor argues the Commission has no authority to set rules. This entire effort by Nicor to restructure the gas industry by pilots is an end run around the legislature to begin with. Now, it has become an end run around the Commission as well.

II. THE COMMISSION SHOULD PROHIBIT THE AFFILIATES FROM USING THE UTILITY NAME AND LOGO

CUB and Cook County agree with the comments by several gas companies that all things being equal, the gas affiliate should, in theory, be the same as the electric rules. **See**, IP at 1,2; Ameren at 3. CUB and Cook County also agree with Nicor's argument that an agency that changes its course must supply a reasoned analysis. Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 852 (1970), Nicor Comments at 2. *See*, IP Comments at 5 (deviating from the electric rules without any evidentiary basis for doing so is inappropriate). However, the Commission must consider two critical issues. First, when the Commission set electric rules there was much less information available regarding marketing than we have today. Second, significant differences between the gas and electric industries have developed in the last few years.

Since the time the Commission set the electric rules, competition has opened up to the electric industry and we have seen very limited efforts by utility affiliates to take unfair advantage of the utility name and logo. However, on the gas side Nicor and Peoples have both operated large-scale pilots which have demonstrated that both companies' strategies involve

marketing to customers in a manner that blurs the distinction between the utility and affiliate. Nicor's pilot includes 285,000 residential customers, while Peoples has publicly stated its intentions to expand its pilot to residential customers this summer (Chicago Sun Times 2/24/01 p.3).

Nicor's pilot results are in. The Company has garnered over 70% of the commercial market and a whopping 93% share of the residential market. We also know that Nicor's affiliate Nicor Energy uses the same name and logo as Nicor, and that consumer groups have alleged in the Nicor pilot investigation that Nicor Energy markets in a way that implies the two companies operate as one. We also know Peoples Gas has made a significant effort to market both the utility and the affiliate as Peoples Energy. Peoples has already begun billing residential customers of Peoples Gas under the Peoples Energy (CUB / Cook Reply Exhibit 1) name and reports related to customer payment plan portrayed spokespeople from Peoples Energy directing Peoples Gas customers to call Peoples Energy to set up payment plans (10 p.m. News Channels 2 and 7, Mar. 8, 2001). Additionally Peoples has changed the names on Peoples Gas trucks to Peoples Energy. *See,* CUB / Cook Reply Exhibit 2. Nicor Gas has made a similar effort by emphasizing the Nicor Name and minimizing "gas" (CUB / Cook Exhibit 3). Thus, all things are not equal, and the Commission has justification to set more stringent rules for gas companies.

III. THE COMMISSION SHOULD PROHIBIT JOINT MARKETING BY ALL GAS AFFILIATES

The most contentious substantive issue in this proceeding is the joint marketing prohibition in Section 550.30 (a) which states "A gas utility shall neither jointly advertise nor jointly market its services or products with those of an affiliated interest." The utilities

unanimously propose adding "in competition with ARGS" at the end of the sentence in order to limit the rule to ARGS affiliates. Peoples at 6, MidAmerican at 2, IP at 4, Nicor at 7, Ameren at 3. However, the Comments are all conclusory and do not make substantive arguments as to why the addition to the gas rule is not needed. The Commission needs to consider whether the joint marketing efforts by utilities and their affiliates in the HVAC industry constitute a problem that does not exist in the electric industry. The Nicor bill inserts attached as CUB / Cook Reply Exhibit 4 demonstrates our concern.

IV. THE GAS RULES SHOULD NOT BE WEAKENED TO ACCOMMODATE THE COMBINATION UTILITIES

Illinois Power and Ameren raise the issue that having different affiliate rules for gas and electric companies would make it difficult for the combination utilities. While there may be some inconvenience to the combination utilities, the proper solution is not to pass weak rules that will not protect against cross-subsidization and customer confusion on the gas side in order to have the same rules. Thus, either the electric rules should be changed to reflect the gas rules, or the companies should abide by two different sets of rules.

CONCLUSION

The Comments submitted by the gas companies do not persuade CUB and Cook County that stronger marketing rules are not needed for gas affiliates than for electric affiliates. Given the level of joint marketing between gas companies and their HVAC affiliates, and the use of the Nicor name and logo by Nicor Energy in the Nicor pilot, the Commission has more than sufficient evidence to support the rule changes proposed by CUB and Cook County.

Respectfully submitted,

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NOTICE OF FILING

TO: (see attached service list)

Please take note that on March 9, 2001 the Citizens Utility Board and the Cook County State's Attorney's Office caused to be filed their Reply Comments in the above-captioned proceeding with Donna Caton, Chief Clerk of the Illinois Commerce Commission, 527 E. Capital Ave., Springfield, Illinois 62701.

Dated: March 9, 2001

Robert J. Kelter

CERTIFICATE OF SERVICE

I, Robert J. Kelter, certify that the foregoing documents, together with a notice of filing, were sent to all parties of record listed on the attached service list by United States Parcel Service – overnight delivery for receipt on March 9, 2001, hand-delivery, United States mail proper postage prepaid, electronic mail or facsimile on March 9, 2001.

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